

DISCUSSIONS-HIGH PRICE OR UNREASONABLE HIGH PRICE

Copyright 2021 Richard D. Lieberman, Consultant & Retired Attorney

Federal Acquisition Regulation (“FAR”) 15.306 states that negotiations with offerors in the competitive range are designed to “maximize the Government’s ability to obtain best value, based on the requirement and evaluation factors set forth in the solicitation.” This section of the FAR also states that the contracting officer must indicate to all offerors in the competitive range the deficiencies, significant weakness and adverse past performance information to which the offeror has not yet had an opportunity to respond. The idea is to make discussions “meaningful.” In a Government Accountability Office (“GAO”) decision, World Wide Technology, Inc., B-417909, Dec. 14, 2020, the protest related to divulging information about the offeror’s price in relation to other offerors.

The remainder of FAR 15.306 includes the following statements:

The contracting officer also is encouraged to discuss other aspects of the offeror’s proposal that could, in the opinion of the contracting officer, be altered or explained to enhance materially the proposal’s potential for award. However, the contracting officer is not required to discuss every area where the proposal could be improved. []

The contracting officer may inform an offeror that its price is considered by the Government to be too high, or too low.

World Wide protested the award of a contract to Hewlett Packard Enterprise Co. under a Defense Informational Systems Agency (“DISA”) solicitation for enterprise storage solutions. The protester contended that the agency’s discussions were misleading and not meaningful. World Wide argued that discussions failed to inform them that its proposed price was unreasonably high. During discussions, World Wide’s initially proposed price was reduced from \$615,666,219 to \$226,624,799. DISA did not advise World Wide that it believed its proposed price was unreasonably high. DISA reported that World Wide’s final price was third lowest of the four final proposals, and compared to the average price of all other offerors, World Wide’s price was 8% higher. DISA also stated that World Wide’s price compared favorably to the independent government cost estimate, i.e. 73% below the \$833 million government estimate.

The GAO denied the protest, stating that there was no basis for DISA to have discussed World Wide’s price in discussions. “Unless an offeror’s proposed price is high so as to be unreasonably or unacceptable, an agency is not required to inform an offeror during discussions that its proposed price is high in comparison to a competitor’s proposed price, even where price is the determinative factor for award.” That was not the case here as shown by the price comparisons with other offerors and the independent government estimate..

Takeaway: A contracting officer is not required (but could make a determination) in discussions to tell you that your price is high. However a contracting officer must tell you that your price is unreasonable or unacceptable, for example if you are significantly above the independent government estimate.

**For other helpful suggestions on government contracting, visit:
Richard D. Lieberman's FAR Consulting & Training at <https://www.richarddlieberman.com/>, and
Mistakes in Government Contracting at <https://richarddlieberman.wixsite.com/mistakes>.**